

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DARCY K. WATSON,

Plaintiff,

v.

JO ANNE B. BARNHART,
Commissioner of Social Security,

Defendant.

No. C06-0514-JCC-MJB

ORDER

This matter comes before the Court on Plaintiff's application for judicial review of the final decision of the Commissioner of the Social Security Administration ("Commissioner"), the Report and Recommendation of United States Magistrate Judge Monica J. Benton ("R&R") (Dkt. No. 15), and Plaintiff's Objections to the R&R (Dkt. No. 16). Having reviewed the materials submitted by the parties, and finding that oral argument is not necessary, the Court hereby finds and rules as follows.

I. BACKGROUND

Plaintiff filed an application for Supplemental Security Income ("SSI") on May 30, 2003 (Record ("R.") 30), alleging disability since December 21, 2002 (R. 74) based on arthritis, curvature of the cervical spine, muscle and joint stiffness, swelling, tightness, and redness and sensitivity of the legs. (R. 38.) The claim was denied initially (R. 33) and on reconsideration (R. 38). Administrative Law Judge

(ALJ) Marguerite Schellentrager held a hearing on March 30, 2005, and took testimony from both Plaintiff and vocational expert Michael Swanson. (R. 273.) The ALJ issued an unfavorable decision on July 12, 2005, determining that Plaintiff was not disabled within the meaning of the Social Security Act. (R. 16.) The Appeals Council denied Plaintiff's request for review on February 11, 2006, making the ALJ's decision the final decision of the commissioner. (R. 5.) Magistrate Judge Monica J. Benton issued an R&R, recommending that this court affirm the Commissioner's decision. Plaintiff filed her objections to the R&R on February 16, 2007, claiming that the ALJ (1) failed to fully develop the record regarding Plaintiff's alleged fibromyalgia, degenerative joint disorder, and sleep apnea, (2) did not have substantial evidence to support her finding that the Plaintiff lacked credibility, and (3) failed to conduct a pain analysis. (Objections (Dkt. No. 16).)

II. STANDARD OF REVIEW

This Court reviews the record *de novo* when considering objections to a magistrate judge's R&R. See 28 U.S.C. § 636(b)(1). A denial of disability benefits may be set aside only when the ALJ's findings are based on legal error or are not supported by substantial evidence in the record. *Benton ex. Rel. Benton v. Barnhart*, 331 F.3d 1030, 1035 (9th Cir. 2003); see also *Flaten v. Sec'y of Health & Human Servs.*, 44 F.3d 1453, 1457 (9th Cir. 1995). Substantial evidence means "more than a scintilla, but less than a preponderance," *Bustamente v. Massanari*, 262 F.3d 949, 953 (9th Cir. 2001) (quoting *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999)), or "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005) (quoting *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989)).

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and for resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995) (citing *Magallanes*, 881 F.2d at 750). If there is more than one rational interpretation of the evidence, the ALJ's conclusion must be upheld. *Burch*, 400 F.3d at 679; see *Andrews*, 53 F.3d at 1039–40.

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III. ANALYSIS

Plaintiff contends that (1) the ALJ did not fully develop the record when she did not order further testing and examinations upon findings of “possible” fibromyalgia and “probable” sleep apnea by consulting physicians and a diagnosis of arthritis and degenerative joint disease by the treating physician; (2) the ALJ did not have clear and convincing reasons to find Plaintiff to be not credible; and (3) the ALJ did not properly conduct a pain analysis as required by Social Security Ruling (SSR) 96-7p (1996).

A. Developing the Record

Although Plaintiff bears the burden of proving her disability, 42 U.S.C. § 423(d)(5)(A), the ALJ has an affirmative duty to fully and fairly develop the record. *Webb v. Barnhart*, 433 F.3d 683, 687 (9th Cir. 2005) (citing *Brown v. Heckler*, 713 F.2d 441, 443 (9th Cir. 1983)). This duty is triggered by “ambiguous evidence, the ALJ’s own finding that the record is inadequate or the ALJ’s reliance on an expert’s conclusion that the evidence is ambiguous.” *Webb*, 433 F.3d at 687. Thus, Plaintiff’s burden of proof must be evaluated in conjunction with the Social Security Administration’s duty to develop a complete medical history for claimants, 42 U.S.C. § 423(d)(5)(B) (as amended October 9, 1984), and to obtain missing information from consultative exam reports, 20 C.F.R. § 416.919p(b).

1. Fibromyalgia

During a consultative examination ordered by the Social Security Administration, the doctor conducted a partial test for fibromyalgia. (R. 193.) The appropriate test for fibromyalgia consists of an eighteen-point pressure test, and a diagnosis of fibromyalgia is given if pain is felt with respect to at least eleven points. *See Sarchet v. Chater*, 78 F.3d 306, 306–07 (7th Cir. 1996). In this case, the consulting physician conducted a ten-point test, and pain was felt at eight of those points. (R. 193.) He then gave a diagnosis of “possible fibromyalgia with multiple trigger points.” (R. 194.) The physician does not explain why a full eighteen-point test was not conducted, although he mentions that the examination was limited because the claimant was in discomfort. (R. 193.) The ALJ held that the test is “not conclusive and lacks objective medical evidence,” and that therefore “the evidence is insufficient to support this

1 diagnosis as a medically determinable impairment.” (R. 23.)

2 Neither side disputes that the appropriate fibromyalgia test consists of eighteen points and that
3 only ten were administered to Plaintiff. The ALJ does not put forth any reason for finding that claimant
4 does not have fibromyalgia other than the inconclusive diagnosis resulting from the incomplete test. It
5 was impossible for Plaintiff to meet the threshold of eleven points because the Social Security
6 Administration’s consulting physician only administered ten points, and therefore Plaintiff cannot be
7 faulted for failing to present evidence of fibromyalgia. When the evidence is ambiguous or the ALJ finds
8 the record incomplete, the ALJ has an affirmative duty to complete the claimant’s medical record. *Webb*,
9 433 F.3d at 687. In the face of an ambiguous diagnosis and incomplete test on the record, the ALJ had
10 an affirmative duty to fully and fairly develop the claimant’s medical record. *See also* 20 C.F.R. §
11 416.919p(b) (regarding missing information in consultative reports). Because that duty was not met, the
12 matter shall be REMANDED for a complete fibromyalgia test.

13 **2. Sleep Apnea**

14 The ALJ held that the claimant “was being evaluated for sleep apnea” but that there were “no
15 objective medical findings to establish this as a medically determinable impairment.” (R. 23.) Plaintiff
16 was referred to the Swedish Sleep Medicine Institute and was initially diagnosed with “probable” sleep
17 apnea. (R. 253.) She was told not to drive and was scheduled for an additional examination. (R. 253.)
18 She did not attend the follow-up examination, allegedly because she thought her son had broken his leg.
19 (R. 283.) There is nothing in the record to contradict the diagnosis of “probable” sleep apnea.

20 Claimants must attend consultative exams unless they have a good reason for not going. 20
21 C.F.R. § 416.918(a). A death or serious illness in one’s immediate family constitutes a good reason. *Id.*
22 § 416.918(b)(4). In this case, the follow-up sleep examination was not a consultative examination
23 ordered by the Social Security Administration. Instead, it was a referral by Plaintiff’s treating physician.
24 However, there is evidence that the ALJ treated the referral like a consultative exam because she asked
25 repeatedly about it during the administrative hearing. (R. 283, 306–07.) She stated that it would be

1 helpful to have the results of that exam because it is “likely there could be something there.” (R. 307.)
2 The ALJ then ordered the record held open for two weeks so that additional results could be added. (R.
3 309.) One week after the hearing, Plaintiff informed the ALJ that additional sleep studies would not be
4 available in that time frame. (R. 72.) The ALJ then found that there were not sufficient medical findings
5 to establish that Plaintiff had sleep apnea. (R. 23.)

6 As with the incomplete fibromyalgia test, there is inadequate and ambiguous evidence regarding
7 Plaintiff’s alleged sleep apnea. Absent a finding that Plaintiff did not have a good reason for missing the
8 exam, Plaintiff was entitled to have the results of the follow-up exam included in the ALJ’s analysis. The
9 ALJ had an affirmative duty to fully and fairly complete the record by (1) determining whether Plaintiff
10 had a good reason for missing her follow-up exam and (2) ordering a follow-up exam if Plaintiff had a
11 good reason. The ALJ failed to fulfill that duty to complete the record. Accordingly, the matter shall be
12 REMANDED for completion of the record on this issue.

13 **3. Degenerative Joint Disease**

14 Plaintiff’s treating physician diagnosed her with degenerative joint disorder and referred her for x-
15 rays, but Plaintiff did not follow through on that referral. The ALJ then found that “degenerative
16 disorders of the back/neck are also noted in the record, but there is no objective evidence or imaging to
17 establish these disorders as medically determinable.” (R. 23.) As part of Plaintiff’s burden of presenting
18 evidence of disability, Plaintiff has the responsibility to attend consultative and, by extension, referral
19 examinations. Because Plaintiff failed to follow through on the referral, it is not compelling for her to
20 now complain that the decision was made without the results of that referral. The ALJ’s finding that
21 Plaintiff failed to present objective evidence to support a diagnosis of degenerative joint disease is
22 AFFIRMED, and the Court ADOPTS the R&R as to this issue.

23 **B. Lack of Credibility**

24 A credibility determination must be based on the entire record. SSR 96-7p (1996). Therefore, if
25 additional medical evidence is obtained upon remand, the ALJ must reevaluate Plaintiff’s credibility. If

no new medical evidence of impairment is obtained, the ALJ's credibility determination stands because she had clear and convincing reasons for her credibility finding. ALJs must give specific, clear and convincing reasons if they find a claimant to lack credibility. *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996). In this case, the ALJ gave specific reasons for her finding that Plaintiff lacked credibility. For example, Plaintiff alleged that she had memory problems (R. 298), but received a discount on her rent for reminding her landlord to take her pills (R. 286). Plaintiff also reported that she had applied to the state to get paid for taking care of her neighbor. (R. 25.) She later reported that she was "going to send in papers for SSI if unable to get paid for caring for friend." (R. 235.) These reasons are clear and convincing, and based on "more than a scintilla" of evidence. The ALJ's finding that the Plaintiff lacked credibility was not in error, but it must be reevaluated if additional medical evidence is obtained on remand. Accordingly, the matter shall be REMANDED for a reevaluation of credibility after completion of the record.

C. Pain Analysis


Plaintiff contends that the ALJ did not use the detailed pain analysis listed in Social Security Ruling (SSR) 96-7p (1996). SSR 96-7p describes how to evaluate the credibility of an individual and lists seven factors that the ALJ must take into consideration when assessing that credibility. SSR 96-7p does not require ALJs to explicitly describe how they took each of those factors into consideration. Plaintiff does not assert which of the seven factors the ALJ allegedly did not take into account; nor does Plaintiff cite any authority beyond SSR 96-7p. In this case, although the ALJ did not list how she analyzed the factors from 96-7p, she did state "I must consider all symptoms, including pain . . . based on the requirements of . . . SSR 96-7p." Because the ALJ stated that she did consider SSR 96-7p, and without any evidence to the contrary, the Court finds no error in the ALJ's finding that the Plaintiff is not credible. However, as described *supra* section III.B, the ALJ must reevaluate Plaintiff's credibility if any additional objective medical is obtained.

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1 **IV. CONCLUSION**

2 For the foregoing reasons, the Court hereby ADOPTS the Report and Recommendation IN
3 PART and REMANDS the matter to the Social Security Administration for further proceedings before
4 the ALJ consistent with this Order. The Clerk is DIRECTED to send copies of this Order to all counsel
5 and to Judge Benton.

6 SO ORDERED this 3rd day of May, 2007.

7 
8 John C. Coughenour
United States District Judge